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**Supreme Court of the United States**

317 US # 37  
OCTOBER TERM, 1942.

No. **493** SCH-SOL

EDWARD L. SCHEUFLE, SUPERINTENDENT OF THE  
INSURANCE DEPARTMENT OF THE STATE  
OF MISSOURI, PETITIONER,

VS.

CENTRAL SURETY AND INSURANCE CORPORATION,  
A CORPORATION, AND R. E. O'MALLEY,  
RESPONDENTS.

**PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF MISSOURI.**

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## INDEX

### Petition for Writ of Certiorari

Statement .....	1
Assignments of Error .....	7
Reasons for Allowance of Writ .....	9

### TABLE OF CASES

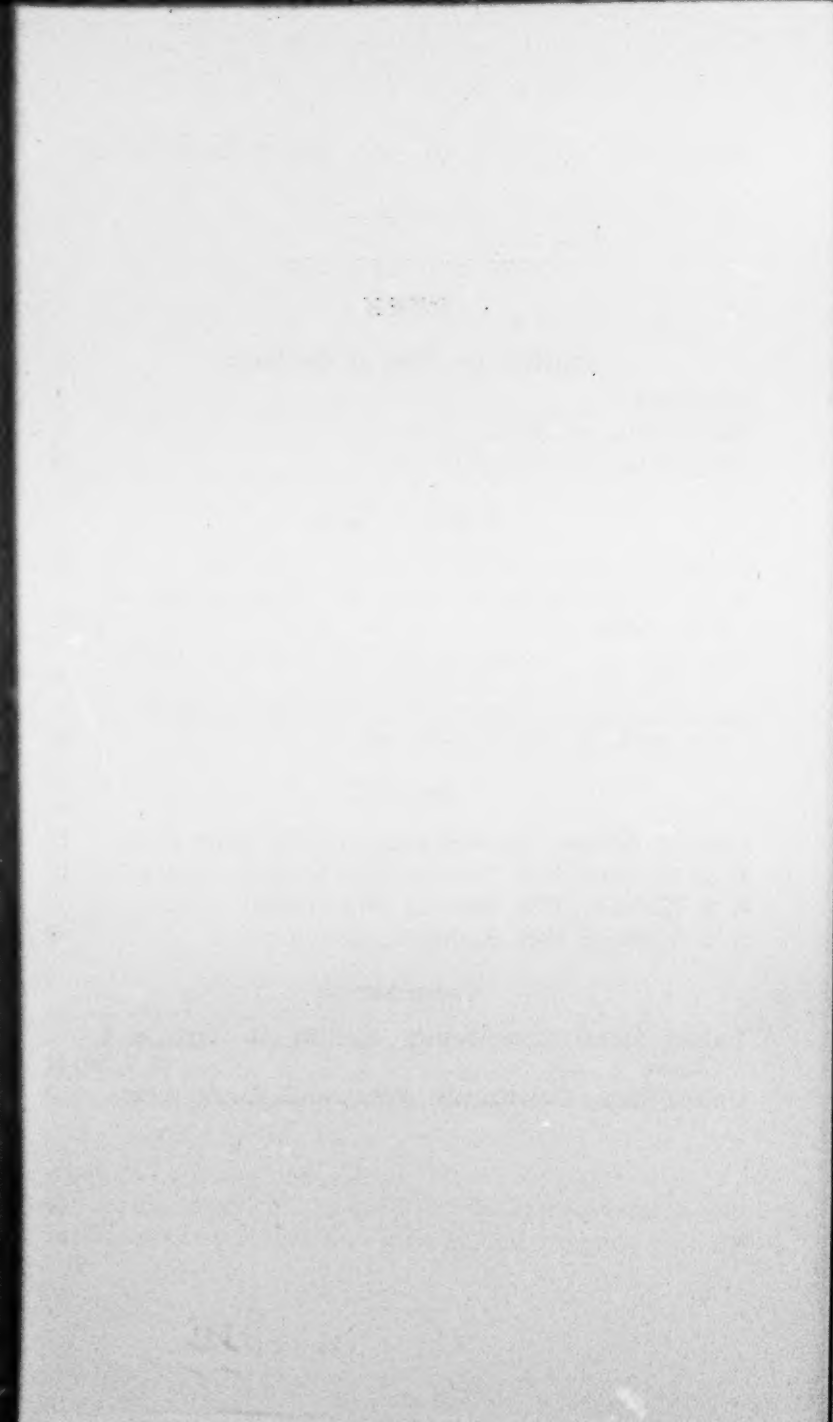
Coolidge vs. Long, 282 U. S. 582, 75 L. Ed. 562 .....	11
In re Manufacturing Lumbermen's Underwriters, 18 Fed. Supp. 114 .....	2, 10
Scheufler vs. Manufacturing Lumbermen's Under- writers, 163 S. W. 2d 749 .....	6
Southern Railway Company vs. Virginia ex rel. Shir- ley, 290 U. S. 190, 78 L. Ed. 260 .....	10

### STATUTES

Laws of Missouri, Extra Session, 1933-34, pages 66-71 .....	11
R. S. Missouri, 1939, Sections 6052 to 6059 .....	2, 4, 7, 8, 9, 10
R. S. Missouri, 1939, Sections 6079 to 6080 .....	7
R. S. Missouri, 1939, Article 11, Chapter 37 .....	9

### CONSTITUTION

United States Constitution, Section 10, Article I, Clause 1 .....	5, 7, 10, 11
United States Constitution, Fourteenth Amendment .....	5



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## PETITION FOR WRIT OF CERTIORARI.

### STATEMENT.

Your petitioner Edward L. Scheufler, Superintendent of the Insurance Department of the State of Missouri, in charge of the assets and affairs of Manufacturing Lumbermen's Underwriters, a reciprocal insurance exchange in liquidation, in his official capacity and on behalf of creditors and subscribers of said reciprocal insurance association, residing in thirty-four states of the Union and five Provinces of Canada whose statutory representative, your petitioner is, shows unto this Court as follows:

First: Your Petitioner is the duly qualified and acting Superintendent of the Insurance Department of the State of Missouri, and in such capacity is in charge of the

assets and affairs of Manufacturing Lumbermen's Underwriters, a reciprocal insurance association now in liquidation, organized in 1898, and existing under the laws of the State of Missouri, until April 1st, 1937, when dissolved by judgment of the Circuit Court of Jackson County, Missouri. As such your Petitioner is the statutory representative of the creditors and subscribers of Manufacturing Lumbermen's Underwriters, who are located in thirty four of the United States and five Provinces of Canada. The association in liquidation was not a corporation or a mutual company but simply an association of individual subscribers to exchange indemnity on a reciprocal plan through a common attorney-in-fact acting under the provisions and limitations of the power-of-attorney executed by these subscribers (See description and analysis of this association by the United States District Court for the Western District of Missouri, in the case of *In re Manufacturing Lumbermen's Underwriters*, 18 Fed. Supp. 114).

Second: The respondents are R. E. O'Malley, predecessor in office of the petitioner, and the official surety of said R. E. O'Malley, the Central Surety and Insurance Corporation. While superintendent of the Insurance Department, R. E. O'Malley was in temporary charge of the reciprocal association, under the Missouri Insurance Code and order of Court from November 12, 1936 until April 1st, 1937, when dissolution of the association was ordered (Tr. 38-40). From April 1st, 1937 until October 20th, 1937, at which time he was succeeded in office, respondent O'Malley was in charge of the assets and affairs of the Association under the Missouri Insurance Code.

Third: The provisions of the Missouri Insurance Code relating to insurance organizations in an insolvent or hazardous condition are Sections 6052 to 6069, inclusive, R. S. Missouri, 1939 (Copied in the appendix to Petitioner's Brief).

Fourth: The rights of the subscribers in the reciprocal insurance association were governed by the written power-of-attorney executed by each reciprocal subscriber. The power-of-attorney is entitled "Application for Insurance," 18 Fed. Supp. 114, l. c. 117, ff. (Appendix to Petitioner's Brief pages 41-45). This contract provided that the subscribers should make an annual premium deposit out of which 20% should be paid to the corporate attorney-in-fact for defraying all except certain named expenses incident to the exchange of indemnity. It was stipulated that the remainder should be kept in a separate individual account and that there should be no joint funds. These separate funds were to be held by a trustee, residing in Kansas City for the use and benefit of the subscribers, subject to payment of losses and other specified expenses. It was provided that this power-of-attorney could be revoked on written notice at which time all funds belonging to the subscribers should be returned.

Fifth: Upon being placed in charge of the affairs of the reciprocal association, the respondent O'Malley proceeded to expend large sums from the subscribers' individual trust accounts allegedly for the purpose of preserving and attempting to rehabilitate and reinsure the business of the association. No application to the Court was made for authority to so expend the individual trust funds of the subscribers. The employees, formerly paid by the attorney-in-fact out of the 20% of the premium income allotted to it, were paid by the respondent O'Malley out of the individual trust funds of the subscribers. The corporate attorney-in-fact, Rankin-Benedict Underwriting Company, had been paid approximately \$600,000 out of the annual premium deposits of \$3,000,000 for the operation of the association during the forthcoming year, the time covered by respondent O'Malley's control.

Sixth: When the respondent O'Malley presented his final report and accounting, exceptions thereto were filed

by his successor in office with respect to the expenditures from subscribers' funds. After hearing evidence adduced at the trial in support of the accounting and in support of the exceptions thereto, the trial court surcharged respondent O'Malley with \$85,264.44 and rendered judgment against the respondent O'Malley and his surety, the respondent Central Surety and Insurance Corporation (Tr. 116-118). The trial court found in its judgment against the respondents, among other things, that the respondent O'Malley had without authority paid exorbitant and unreasonable sums of money under the guise that said sums were for salaries for services rendered in the settlement of the business of Manufacturing Lumbermen's Underwriters, when, in fact, no such services were rendered; that the respondent O'Malley paid out large sums as rents for quarters unnecessary to the business and affairs of Manufacturing Lumbermen's Underwriters and permitted them to be used for the benefit of others; that the expenditure of a total sum of \$85,264.44 was not necessary to the settlement of the business of Manufacturing Lumbermen's Underwriters. The trial court allowed the respondent O'Malley credit in his account for the sum of \$43,648.04 (Tr. 105-107).

Seventh: On appeal the Supreme Court of Missouri reversed the judgment of the trial court holding that under the Missouri Insurance Code, Sections 6052-6069, the Superintendent of Insurance in charge of a reciprocal insurance association has the power, without application to the Court or notice of hearing to the subscribers thereof, to make expenditures out of the trust funds of subscribers for the operation of the office of the attorney-in-fact and for the purpose of "rehabilitating, reinsuring and maintaining as far as possible the *status quo*." It was held by the Supreme Court of Missouri that the Superintendent of Insurance was not a mere receiver but an administrative agency having power to expend the individual funds of subscribers in his discretion without prior hearing or

notice to the subscribers. The Supreme Court of Missouri made no express reference to or ruling upon the effect of the Missouri Insurance Code as an impairment of the contractual rights growing out of the power-of-attorney.

This interpretation of the Insurance Code was recognized by the Missouri Supreme Court as an interpretation of first impression, the sections involved being recently enacted (Tr. 1341, 1353).

Eighth: When the original opinion reversing the judgment of the trial court was rendered, your petitioner filed a motion for rehearing (Tr. 1358-1387). This motion charged that the construction given to the powers of the Superintendent of the Insurance Department under the Missouri Insurance Code, permitting the Superintendent of Insurance without prior notice, hearing or order of Court to expend the individual funds of the subscribers (whom petitioner represents) violated Section 10, Article I, Clause 1, of the Constitution of the United States, because such exercise of these powers amounted to an impairment of the obligation of contract by the State. Such action impaired the obligation by which the subscribers had specifically contracted against the use of their individual funds (the 80% remaining after the payment of 20% for expenses of the operation of the Association) for purposes other than those permitted in the power-of-attorney. The motion for rehearing also charged that this construction given by the Court to the powers of the Superintendent under the Code deprived the subscribers (represented by the petitioner) of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States in this: The Superintendent was held to have the legal authority under the state law to expend, from the 80% held as individual trust funds, unlimited amounts for operating expenses, rent and salaries while in charge under the Code without notice or hearing accorded to the individual and private subscribers before the Superintendent or in

Court. This delegation of powers to expend private funds without prior notice or hearing was asserted to be a deprivation of due process of law.

The Supreme Court overruled the motion for rehearing without opinion, refusing to write upon the constitutional issues raised in the motion for rehearing.

A motion to transfer to the Court *en banc* was filed both in the Court *en banc* and in Division Number 2 which rendered the opinion. The Court *en banc* denied the motion to transfer in a written opinion (Tr. 1470-1472); *Scheufler v. Manufacturing Lumbermen's Underwriters*, 163 S. W. 2d 749, denying jurisdiction to entertain the motion. The motion to transfer filed in Division Number 2 was overruled without opinion (Tr. 1472).

Ninth: The petitioner, as Superintendent of Insurance and as the representative of the subscribers whose funds have been expended, then filed this petition for certiorari to review the constitutionality of the Missouri Insurance Code as interpreted by the Missouri Supreme Court with respect to the constitutional right of the Superintendent to expend the individual funds of subscribers of a reciprocal association, placed in his charge, for general operating expenses without prior notice or hearing or determination of the necessity therefor, the reasonableness thereof or the right to do so.

### ASSIGNMENTS OF ERROR.

1. The Missouri Insurance Code (Sections 6052 to 6069, R. S. Missouri, 1939) as construed by the Supreme Court of Missouri to give the Superintendent of Insurance authority to pay operating expenses, rent, salaries and the like from the individual trust funds of the subscribers (the 80% remaining after 20% prepayment for expenses) without prior notice, hearing or order violates Section 10, Article I, Clause 1, of the Constitution of the United States in this: So construed, the laws of Missouri impair the obligation of the contract embodied in the power-of-attorney entitled "Application for Insurance" (Appendix to Petitioner's Brief, page 41).

The subscribers in their power-of-attorney, a contract previously approved by the state (Sections 6078 to 6080, R. S. Missouri, 1939) had contracted against the use of any of their individual trust funds for the very purposes for which the Missouri law permits their use in the case at bar. The Missouri Supreme Court erred in refusing to pass upon this point and to hold the law unconstitutional on its face and in its operation, after adopting the construction given the Code in the case at bar.

2. The Missouri Insurance Code (Sections 6052 to 6069, R. S. Missouri, 1939) as construed by the Supreme Court of Missouri to give the Superintendent of Insurance authority to pay operating expenses, rent, salaries and the like from the individual trust funds of the subscribers (the 80% remaining after 20% prepayment for expenses) without prior notice, hearing or order deprives the subscribers (whom petitioner here represents) of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States in this: That the funds in the hands of the Superintendent were the individual funds of the subscribers and kept in a separate account for the pur-

pose stated in the power-of-attorney; 20% had been deducted and previously paid for operating expenses. The Insurance Code as construed by the Missouri Supreme Court (Sections 6052 to 6069, R. S. Missouri, 1939) permits the Superintendent to spend, out of the 80% held in trust for the individual subscribers for specific purposes, sums for operating expenses, rent and salaries in the discretion of the Superintendent without prior notice or hearing to the subscribers. The Code delegating power to the Superintendent to expend individual funds of the subscribers without any notice or hearing is a deprivation of due process of law. The Missouri Supreme Court erred in refusing to pass upon this charge of unconstitutionality and to hold the Code unconstitutional after adopting the construction given it in the case at bar.

### REASONS FOR ALLOWANCE OF WRIT.

1. This cause involves the serious and important question of the constitutionality of the Missouri Insurance Code relating to the powers of the Superintendent of Insurance when placed in charge of a reciprocal insurance association organized and existing under Article 11, Chapter 37, R. S. Missouri, 1939, in which the rights of the subscribers, attorney-in-fact and third persons are governed by a specific written contract provided for and required by Missouri statutes (Sections 6078 to 6080, R. S. Missouri, 1939). The Superintendent of the Insurance Department of the State of Missouri on behalf of subscribers, creditors and policy holders is himself challenging the constitutionality of Sections 6052 to 6059 of the Missouri Insurance Code in the light of the due process clause and in the light of the contract clause of the Federal Constitution. In the case at bar the trial court has found that without any notice or hearing to the subscribers, the respondent O'Malley, while in charge of the Association, misspent over \$85,000 of moneys belonging to the subscribers. The Supreme Court of Missouri has construed the statutes relating to the powers of the Superintendent to authorize the Superintendent while in charge of a reciprocal insurance association to spend the individual funds of the subscribers without notice or hearing to the subscribers in court or before the Superintendent, and further authorizes these funds to be spent for purposes for which the subscribers have specifically contracted that their funds may not be used.

In the interest of settling the grave issues of constitutionality involved in the far-reaching provisions assailed and in the interest of justice to the subscribers located in thirty-four of the United States and five provinces of Canada, it is submitted that this Court should assume jurisdiction and settle these questions.

2. The powers of the Superintendent under Sections 6052 to 6069, R. S. Missouri, 1939, when exercised in the case of reciprocal insurance associations under control of the Superintendent violate the due process clause of the Federal Constitution contained in the Fourteenth Amendment thereto. The funds which respondent O'Malley, as Superintendent, used to pay operating expenses, rent and salaries without approval of court and without hearing or notice of any character were individual private property under the power-of-attorney; they were not general association or company funds. (See *In re Manufacturing Lumbermen's Underwriters*, 18 Fed. Supp. 114). The use of such private funds by an administrative agent without according any notice and opportunity to be heard on the question of the liability of the private property to the use of the administrative agency is a deprivation of due process of law. Such conduct and the statute authorizing it are unconstitutional and in violation of the principle of the following case: *Southern Railway Company v. Virginia ex rel. Shirley*, 290 U. S. 190, 78 L. Ed. 260.

3. The statutes, Sections 6052 to 6069, R. S. Missouri, 1939, empowering the Superintendent without notice or hearing or authority of court to expend individual private trust funds owned by the subscribers, not subject to expenditures for rent, salaries, operation and the like, violate Section 10, Article I, Clause 1, of the Constitution of the United States in this: The power-of-attorney creates a trust fund of 80% of the annual deposits to be held for the individual account of the subscribers and not subject to the expenses of operation. These expenses of operation under the contract were to be paid from the funds of the attorney-in-fact who received 20% of each deposit for these purposes. The Missouri statute as construed by the Missouri Supreme Court permits the Superintendent of Insurance, without any notice or hearing having been accorded the owners of the individual funds,

to impair the contract and in violation of the express provisions thereof to pay expenses of operation in his discretion from subscribers' individual trust funds. The state law under which this action is taken was enacted subsequent to the formation of the association and execution of the power-of-attorney. Laws of Missouri, Extra Session, 1933-34, pages 66-71. The obligation of the contract (the power-of-attorney) is unconstitutionally impaired by the action of Missouri in enacting and enforcing a law after execution of the contract which causes or permits action to be taken in violation of the express terms of the contract and trust created thereby, Section 10, Article I, Clause 1, United States Constitution; *Coolidge v. Long*, 282 U. S. 582, 75 L. Ed. 562.

For these reasons it is respectfully submitted that this petition should be granted.

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the State of Missouri,

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